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Possible reform of investor-State dispute settlement (ISDS)

Submissions from International Intergovernmental Organizations and additional information: appointment of arbitrators

Note by the Secretariat

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I. Introduction

1. At its forthcoming thirty-fifth session, the Working Group may wish to consider the question of arbitrators and decision makers in ISDS. Section C of document A/CN.9/WG.III/WP.142, Possible reform of investor-State dispute settlement (ISDS), which was before the Working Group at its thirty-fourth session, provides a summary of issues and concerns expressed regarding this question. The Working Paper, including Section C, refers to a broad range of published information on ISDS,¹ and does not seek to express a view on the desirability of reforms as regards issues and concerns discussed.

2. Paragraphs 42 to 44 of document A/CN.9/WG.III/WP.142 summarize concerns expressed about the appointment and ethical requirements of arbitrators, including those arising from the party-appointment method.

3. The Working Group may also wish to take into consideration the information set out in document A/CN.9/916, Possible future work in the field of dispute settlement: Ethics in international arbitration, which explores the concept of ethics in international arbitration and outlines existing legal frameworks (including national legislation, arbitration rules, case law and codes of ethics in investment treaties). That note was produced in response to the Commission's request to explore the possibility of future work on a code of ethics in investment arbitration, drawing upon issues identified in the context of conduct of arbitrators, their relationship with those involved in the arbitration process, and the values that they were expected to share and convey.² The Commission also heard that issues relating to conflicts of interest of arbitrators could usefully be further elaborated.³

4. Section II of this note sets out a submission from the International Centre for Settlement of Investment Disputes (ICSID) on Arbitrator Appointments in ICSID, and Section III sets out a submission from the Permanent Court of Arbitration (PCA) on Arbitrator Appointments and Arbitrator Challenges. Both submissions were made in preparation for the thirty-fifth session of Working Group III, and are reproduced in the form in which they were received by the Secretariat, other than as regards minor editorial changes to ensure consistency in presentation.

5. As shown in these submissions, in the ISDS regime as it currently stands, disputing parties normally enjoy broad powers in the selection of arbitrators. The rules applicable in investor-State arbitration allow disputing parties to agree on the method to select the arbitrators and to agree directly upon the identities of such arbitrators.

6. As further detailed in the submissions from ICSID and the PCA, arbitrators may also be appointed by appointing authorities. Appointing authorities, which usually

¹ These resources include online resources regarding ISDS reform, available on the UNCITRAL website at http://www.uncitral.org/uncitral/en/publications/online_resources_ISDS.html, which includes information published by the United Nations Conference on Trade and Development (UNCTAD), the Organization for Economic Cooperation and Development (OECD), the Centre for International Dispute Settlement (CIDS), a joint research centre of the Graduate Institute of International and Development Studies and the University of Geneva Law School, as well as information published by the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA), and the E15 Initiative on Strengthening the Global Trade and Investment System for Sustainable Development, jointly undertaken by the International Centre for Trade and Sustainable Development (ICTSD) and the World Economic Forum (WEF).

² See, further, *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17 (A/71/17)*, paras. 182–186; *Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17)*, paras. 148–151, document A/CN.9/880 — Settlement of commercial disputes: Possible future work on ethics in international arbitration, and document A/CN.9/855 — Proposal by the Government of Algeria: possible future work in the area of international arbitration between States and investors — code of ethics for arbitrators.

³ *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17 (A/71/17)*, para. 184.

intervene in the appointment process to appoint the presiding arbitrator in a three-person tribunal, are playing a broader role in ISDS. As its submission below explains, ICSID as an appointing authority sets requirements for appointees, including as regards ethical conduct and qualifications.

7. The role of appointing authorities is generally not limited to the appointment process and requirements. It may include taking decision on challenges to arbitrators on ethical or other grounds, or, as under the UNCITRAL Arbitration Rules, at the stage of costs determination. As the submission from the PCA indicates, the majority of its ISDS cases relate to arbitration proceedings under the UNCITRAL Arbitration Rules, which allow for an arbitrator to be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

8. Comments commonly expressed regarding the appointing authority role concern the lack of available information on the selection and appointment processes, and the limited mechanism for public or internal accountability of appointing authorities. The absence of transparency in the appointment mechanism mentioned in paragraph 44 of document A/CN.9/WG.III/WP.142 arises largely in connection with the appointing authority mechanism.

II. Submission by the International Centre for Settlement of Investment Disputes (ICSID)

[Original: English]

[Date: 15 February 2018]

Arbitrator appointments in ICSID

9. This submission provides background for UNCITRAL delegates on appointment of arbitrators generally and under the rules of the International Centre for Settlement of Investment Disputes (ICSID).

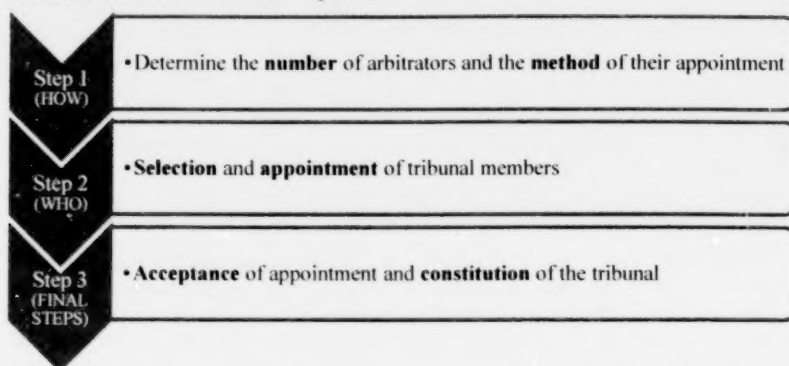
I. Introduction

10. In general, arbitrators in investment cases are appointed by a disputing party, by the parties jointly, by an arbitral institution, or by an appointing authority. Many investment treaties and contracts contain specific provisions governing appointment, and these take precedence over the ICSID rules. If there are no specific rules in the treaty or contract, the ICSID rules set out a procedure for appointing a tribunal.

11. To date, 84 per cent of arbitrators on ICSID tribunals were appointed by the parties, or by the party-appointed arbitrators. The remaining 16 per cent of tribunal appointments were made by ICSID based on an agreement of the parties or the applicable default provisions. A total of 1,868 appointments have been made by the parties or by party-appointed arbitrators, and by ICSID, including the Secretary-General and Chairman of the Administrative Council. The Chairman has made 249 arbitrator appointments (13 per cent), including cases where the parties agreed to request the Chairman to appoint an arbitrator.

12. The process of appointing a tribunal raises three basic issues: how the tribunal will be selected (number and method), selection of the individual arbitrators to serve on the tribunal (who), and how the tribunal is constituted (acceptance of appointment and constitution).

Chart

Constitution of the tribunal — process**2. How many arbitrators on a tribunal?**

13. Parties must first agree on the number of arbitrators that will sit on the tribunal. The relevant treaty or contract may address this. For example, Article 1123 of the North American Free Trade Agreement (NAFTA), states that unless the parties agree otherwise, "the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties."

14. If there is no agreement on the number of arbitrators in an ICSID proceeding, the parties may agree to a sole arbitrator or any uneven number of arbitrators. Selecting a sole arbitrator may help reduce costs and expedite the case, however parties usually agree on a three-person tribunal for investment treaty cases given the complexity of the issues that can arise. In the past 46 years, since the first tribunal was constituted in *Holiday Inns v. Morocco* (ICSID Case No. ARB/72/1), 98 per cent of ICSID tribunals have been three-person tribunals, with 2 per cent of cases presided over by sole arbitrators.

3. Method of appointment**Party agreement: ICSID Convention, Article 37(2)(a)**

15. The next decision for parties concerns the method of appointment. The most usual method of appointment selected by parties is to have three-member tribunals with each party appointing one co-arbitrator and the parties jointly agree on the presiding arbitrator or the co-arbitrators selecting the presiding arbitrator.

16. Another option is for the parties to agree that an appointing authority such as the ICSID Secretary-General or the Chairman of the ICSID Administrative Council will appoint the presiding arbitrator or all three members of the tribunal. Yet another option is for the parties to use a list procedure. In this case, ICSID provides a list of potential candidates, and the parties rank the nominees in order of preference and veto nominees they would not consider. The candidate with the best ranking would be selected.

Default mechanism: ICSID Convention, Article 37(2)(b)

17. If the parties are unable to agree on the number of arbitrators and the method of their appointment, these decisions will be made by applying a default provision. At ICSID, the default provision is contained in Article 37(2)(b) of the ICSID Convention. It provides that:

- (a) The tribunal will consist of three arbitrators;
- (b) Each party will appoint one co-arbitrator; and

- (c) The parties will agree on the third arbitrator, the President of the tribunal;
- (d) Either party can invoke this provision 60 days after registration of the request for arbitration.

ICSID appointment: Article 38

18. If the parties are still unable to appoint all members of the tribunal within 90 days after registration of the request for arbitration or any other agreed period), either party may request that the Chairman of the ICSID Administrative Council appoint the arbitrator(s) not yet appointed (Article 38 of the ICSID Convention).

19. In practice, parties can almost always appoint their own party nominee and it is rare for a party nominee to be appointed by default. Where invoked, the default mechanism is most often used to appoint a presiding arbitrator.

20. When a party asks ICSID to appoint a sole arbitrator or a tribunal President, ICSID first conducts a ballot procedure:

- (a) ICSID provides the parties with a ballot form, containing the names of several candidates;
- (b) Each party completes the ballot form, indicating the candidates it would agree to;
- (c) A party is not required to share its ballot with the other party;
- (d) If the parties agree on a candidate from the ballot, that person will be deemed to have been appointed by agreement of the parties;
- (e) If the parties agree on more than one proposed candidate, ICSID selects one of them and informs the parties of the selection.

21. A successful ballot is considered an appointment by agreement of the parties under the established method of constituting the tribunal.

22. If the parties do not agree on a ballot candidate, the Chairman of ICSID's Administrative Council appoints a person from the ICSID Panel of Arbitrators, after consultation with the parties.

4. Selection of arbitrators

23. Parties can, but are not required to, select arbitrators from the ICSID Panel of Arbitrators. The Panel of Arbitrators is a list of persons nominated by ICSID member States to be available for appointment in cases. The ICSID Secretariat has prepared a note on "Considerations for States in Designating Arbitrators and Conciliators to the ICSID Panels" which sets out relevant considerations for States in compiling these lists.

Requirements for appointees

24. The Convention sets certain requirements regarding the qualifications of appointees to ICSID tribunals and their nationality, but the parties are otherwise free to choose whomever they wish.

Arbitrator Qualifications

25. Like most arbitration rules, the ICSID Arbitration Rules have formal qualifications for appointment that must be met. All ICSID arbitrators must be persons:

- (a) Of high moral character;
- (b) With recognized competence in the fields of law, commerce, industry or finance; and
- (c) Who may be relied upon to be impartial and to exercise independent judgment (Article 14(1) and Article 40(2) of the Convention).

Nationality Requirement

26. A majority of arbitrators on a tribunal must be nationals of States other than the State party to the dispute and the State whose national is a party to the dispute (Article 39 of the Convention and Arbitration Rule 1(3)), unless each individual member of the tribunal is appointed by agreement of the parties. Where a tribunal consists of three members, an arbitrator cannot have the same nationality as either party unless both parties agree to that appointment.

27. In practice, this means that:

(a) A sole arbitrator may not have the same nationality as either party unless both parties agree; and

(b) If each party has appointed a person of an excluded nationality (as approved by the other party), the parties must also agree on the appointment of the President of the tribunal.

Additional considerations for selecting arbitrators

28. In addition to the requirements established by the Convention, there are practical considerations that parties often consider when selecting an arbitrator. These include:

(a) Knowledge of the relevant law(s) — this could include public international law and international investment law;

(b) Absence of conflict of interest;

(c) Experience as an arbitrator — this factor is especially relevant for the presiding arbitrator who must manage proceedings involving complex factual and legal questions and procedural rulings;

(d) Language proficiency — although interpretation is always available, parties may consider an arbitrator's capacity in different languages to reduce costs;

(e) Timeliness and availability of arbitrator — parties can consider these factors when identifying arbitrators for appointment and ICSID takes them into account in making appointments by requesting relevant information from candidates;

(f) Cohesiveness of the tribunal — arbitrators must work collegially with co-members in the proceeding;

(g) Other areas of expertise — subject matter expertise relevant to the dispute can also be valuable.

29. ICSID has various materials on its website and in its newsletters that address how parties can identify potential tribunal members. For instance, in the February 2017 issue of the ICSID Newsletter, ICSID featured a piece on "How to Select an Arbitrator" and provided an update and guidance on the Panel designations in the January 2018 issue. As well, the ICSID website includes the curricula vitae of ICSID arbitrators which may assist parties in their selection.

5. Appointment of an arbitrator and acceptance of appointment

30. Once a tribunal member is selected, the parties provide ICSID with the arbitrator's complete name, nationality, contact information and a current curriculum vitae. The ICSID Secretariat writes to the appointee requesting their acceptance of the appointment within 15 days, pursuant to Arbitration Rule 5(3). The letter seeking acceptance annexes documents regarding the case calendar and schedule of proceedings, as well as information on applicable fees. ICSID aims to ensure that proceedings are time and cost efficient and encourages prospective arbitrators, conciliators and Committee members to confirm their availability during the next 24 months to ensure they participate in a timely manner. The letter seeking acceptance also asks each arbitrator, conciliator and Committee member to confirm their nationality(ies). This is to avoid any conflict with the nationality requirements under the ICSID rules (see Article 39 of the ICSID Convention and Arbitration Rule 1(3)).

31. When accepting an appointment, each arbitrator, must make a declaration as to their independence and impartiality and sign a confidentiality undertaking in the form set by Arbitration Rule 6(2). The signed declaration should include a statement of any relevant information, including information regarding past and present professional, business and other relevant relationships (if any) with the parties and their counsel. The statement should cover any circumstances that might raise justifiable doubts about the appointee's reliability to exercise independent judgment.

32. Each arbitrator has a continuing obligation to promptly notify the Secretary-General of any relationship or circumstance that arises during the proceeding that might bring into question the independence and impartiality of the arbitrator.

33. The Secretary-General notifies the parties of the appointee's acceptance or refusal of appointment and provides them with the arbitrator's declaration. If an arbitrator refuses or fails to accept the appointment within 15 days, ICSID will invite the appointing party to nominate another arbitrator. The Centre endeavours to complete the appointment process within 30 days of the request for appointment.

6. Constitution of the tribunal and effects of constitution

34. The tribunal is constituted on the date the Secretary-General notifies the parties that all arbitrators have accepted their appointments (Arbitration Rule 6(1)).

35. Once a tribunal is constituted, the proceedings are deemed to have begun and a member of the ICSID Secretariat (legal counsel) is designated to serve as Secretary of the tribunal. ICSID then sends the case file, including the request for arbitration and all correspondence between ICSID and the parties to the members of the tribunal, along with any request for provisional measures made under Arbitration Rule 39(1) and (5). The constitution triggers certain procedural time limits, such as the time within which a first session with the parties must be held and any preliminary objections filed.

7. Note on appointment of ad hoc committees in annulment proceedings

36. ICSID tribunal awards may be reviewed in accordance with Article 52 of the ICSID Convention. The appointment of ad hoc committees is different from tribunal appointments in several respects.

37. As soon as possible after the application for annulment is registered, the Chairman of the Administrative Council appoints three persons from the Panel of Arbitrators to form an ad hoc committee which will decide the application. Ad hoc committees must be selected from the ICSID Panel of Arbitrators. There is no party appointment in annulment proceedings. ICSID informs the parties of the proposed appointees and circulates their curricula vitae. The Centre endeavours to complete the appointment process as soon as possible after the registration of the annulment; on average within 60 days.

38. The same qualities and considerations apply to the selection of a committee member as to a tribunal member. Additionally, a member of an ad hoc committee cannot have sat on the tribunal which rendered the award, share the nationality of the tribunal's members, have the same nationality as the disputing parties (State and National of Another State), have been designated to the Panel of Arbitrators by the State party to the dispute or the State whose national is a party to the dispute, or have acted as a conciliator in the same dispute. As a result, in each annulment proceeding there are often five or more nationalities excluded from consideration.

39. Once the ad hoc committee members have accepted their appointments, the committee is constituted and the proceedings begin. The Arbitration Rules apply, *mutatis mutandis*, to an annulment proceeding (Arbitration Rule 53). This means that the conduct of an annulment proceeding is similar to the conduct of an arbitration, including a first session of the ad hoc committee and a written and oral process. The procedure is described in detail in the Centre's Background Paper on Annulment for the Administrative Council of ICSID.

8. Further information

40. For further information, please visit the ICSID website, including the case database and the Caseload Statistics. A video of ICSID's Secretary-General Meg Kinnear discussing the steps ICSID takes when it is asked to appoint an arbitrator is available on ICSID's live-stream site. In addition, ICSID staff are available to answer any further questions from delegates.

III. Submission by the Permanent Court of Arbitration (PCA)

[Original: English]
[Date: 16 February 2018]

Arbitrator appointments and arbitrator challenges

41. The Permanent Court of Arbitration ("PCA") is an independent intergovernmental organization established in 1899 to facilitate arbitration and other forms of dispute resolution. Having acted as registry in over 180 investor-State dispute settlement ("ISDS") proceedings and numerous arbitrations under public international law, the PCA is pleased to support the discussion of Working Group III at a technical level. This is the PCA's second submission to UNCITRAL Working Group III.⁴ It provides the Working Group with information about arbitrator appointments and arbitrator challenges in ISDS cases for which the PCA has acted as registry.

1. Appointing authority requests in ISDS cases

42. The PCA Secretary-General has received over 700 requests to act as appointing authority or designate an appointing authority.⁵ One hundred and fifty-six, or 22 per cent, of these requests were submitted between 2001 and January 2018 in ISDS cases for which the PCA acted as registry.⁶

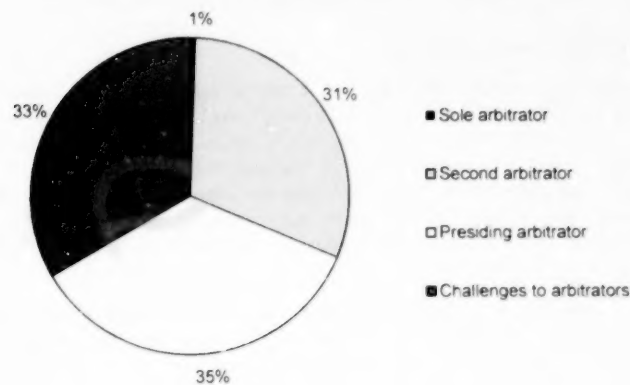
43. Out of these 156 requests, 104 requests concerned the appointment of an arbitrator (48 in respect of second arbitrators, 55 in respect of presiding arbitrators and 1 in respect of a sole arbitrator). Fifty-two requests made in 33 distinct proceedings concerned an arbitrator challenge.

⁴ A first submission addressed the PCA's involvement in the settlement of investment-related disputes, including State-State arbitration and investor-State arbitration, see UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Submissions from International Intergovernmental Organizations, 13 October 2017, A/CN.9/WG.III/WP.143.

⁵ The parties may agree that the PCA Secretary-General act as appointing authority in proceedings under any procedural rules. In addition, the PCA Secretary-General is empowered under the UNCITRAL Arbitration Rules to designate an appointing authority where no appointing authority is agreed. The UNCITRAL Arbitration Rules 1976 entrust the Secretary-General with the power to designate the appointing authority in cases where: (i) the parties cannot agree on the choice of a sole arbitrator; (ii) the respondent fails to appoint a second arbitrator; (iii) the two party-appointed arbitrators cannot agree on the choice of the presiding arbitrator; or (iv) when a challenge to an arbitrator is to be decided, and the parties cannot agree on an appointing authority or an agreed appointing authority refuses or fails to act. Under the UNCITRAL Arbitration Rules 2010 and 2013, a party may request the Secretary-General to designate an appointing authority at any time.

⁶ In recent years, the proportion of appointing authority requests relating to ISDS cases has risen to almost 40 per cent.

Figure 1
Appointing authority requests in ISDS registry cases at the PCA



44. Sixty-nine cases, or 38.5 per cent, proceeded without the need for any assistance by an appointing authority.

45. Since the great majority of appointing authority requests received by the PCA in respect of ISDS cases relate to arbitration proceedings pursuant to the UNCITRAL Arbitration Rules, the following sections will principally focus on the procedures for appointments and challenges under those Rules.⁷

2. Appointing authority requests in ISDS cases

46. Unless the parties agree on the appointment of a sole arbitrator, a three-member tribunal is to be constituted in arbitrations pursuant to the UNCITRAL Arbitration Rules. The mechanism for the constitution of a three-member tribunal may be summarized as follows:

Figure 2
Appointment of a three-member tribunal under the UNCITRAL Arbitration Rules



⁷ Since the PCA Arbitration Rules 2012 are based on the UNCITRAL Arbitration Rules 2010 — with certain changes to (i) reflect the public international law elements that may arise in disputes involving a State, State-controlled entity, and/or intergovernmental organization and (ii) indicate the role of the Secretary-General and the PCA's International Bureau — much of the information contained in this submission also applies to proceedings under the PCA Rules.

47. Accordingly, an appointing authority may be called upon to assist in the appointment process by appointing the second arbitrator of a three-member tribunal; the presiding arbitrator of a three-member tribunal; or a sole arbitrator.

(a) Appointment of the second arbitrator

48. The appointing authority shall appoint a second arbitrator upon request of a party if, within thirty days after the receipt of a party's notification of the appointment of an arbitrator, the other party has not notified the first party of the arbitrator whom it has appointed.⁸ From 2001 to January 2018, the appointment of a second arbitrator was requested in 48 ISDS cases. In 31 instances the appointment was made by the appointing authority, while in 17 instances the respondent appointed the second arbitrator shortly after the claimant had requested the intervention of the appointing authority.

49. Before proceeding to an appointment, the Secretary-General may seek further information as to the nature of the case or circumstances pertaining to the Secretary-General's prima facie competence to act under the Rules. In selecting a suitable arbitrator, the Secretary-General will typically take account of the following factors, subject to any specific requirements that the treaty parties or disputing parties may have identified:

- (a) The nationalities of the parties;
- (b) The place of arbitration;
- (c) The language(s) of the arbitration;
- (d) The amount claimed; and
- (e) The subject-matter and complexity of the dispute.

50. And, with respect to any prospective arbitrator:

- (a) Nationality;
- (b) Qualifications;
- (c) Experience;
- (d) Place of residence;
- (e) Language abilities; and
- (f) Availability.⁹

(b) Appointment of the presiding arbitrator

51. Under the UNCITRAL Arbitration Rules, the disputing parties have no direct role in appointing the presiding arbitrator. Such appointment falls in principle to the co-arbitrators. In the event that the co-arbitrators fail to agree within thirty days, the intervention of the appointing authority may be solicited. From 2001 to January 2018, a presiding arbitrator was appointed in 55 ISDS cases for which the PCA acted as registry.

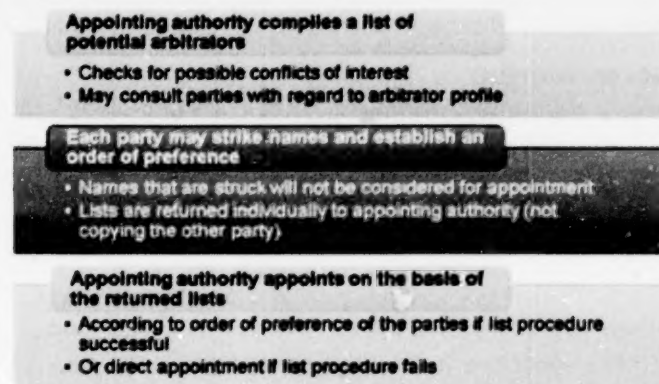
⁸ Article 7(2)(a) of the UNCITRAL Arbitration Rules 1976, Article 9(2) of the UNCITRAL Arbitration Rules 2010.

⁹ Brooks W. Daly, Evgeniya Goriatcheva and Hugh A. Meighen, *A Guide to the PCA Arbitration Rules* (Oxford University Press 2014) MN 4.10.

52. The UNCITRAL Arbitration Rules provide, by default, for the conduct of a list-procedure, which may be graphically represented as follows:

Figure 3

List-procedure under the UNCITRAL Arbitration Rules



53. The Secretary-General may enquire with the disputing parties as to the profile — including any particular qualifications — that the arbitrator should possess. Occasionally, the parties themselves approach the Secretary-General with an agreed set of qualifications or other criteria.

54. The list-procedure described above applies “unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case”.¹⁰ Utilizing the discretion afforded by the Rules, the PCA Secretary-General has regularly asked disputing parties whether they would agree to a modified list procedure, pursuant to which the number of strikes by each side is limited to “50 per cent minus 1”. This approach is designed to assure that at least one common candidate remains on the list, even if the parties strike the maximum number of candidates.

55. The following appointment mechanisms have also been used in place of the default list-procedure, generally at the joint request of the parties:¹¹

(a) List procedure excluding “strikes”: the parties are limited to ranking candidates on the list and/or commenting on the relative qualifications and suitability of candidates;

(b) List procedure on the basis of a closed list/roster: the appointing authority’s choice is limited to persons nominated to a closed list of arbitrators;

(c) List procedure on the basis of lists from the parties: the list procedure is conducted on the basis of names separately supplied by each party, rather than a list composed by the appointing authority;

(d) Selection between options submitted by the parties: following bilateral discussion, the parties jointly submit a shortlist of candidates to the appointing authority, who will then select one candidate for appointment without providing reasons for its choice;

(e) Selection at discretion of appointing authority: finally, the selection of the sole or presiding arbitrator (or, indeed, all arbitrators) may be placed in the hands of

¹⁰ Article 6(3) of the UNCITRAL Arbitration Rules 1976, Article 8(2) of the UNCITRAL Arbitration Rules 2010.

¹¹ D. Pulkowski, “Permanent Court of Arbitration”, in R.A. Schütze (ed.), *Institutional Arbitration: Article-by-Article Commentary* (forthcoming, 2nd ed., C.H. Beck/Hart/Nomos, 2018), Article 8.

the appointing authority. While the parties may be invited to provide general comments on the required profile of the arbitrator, they have no role in proposing or commenting on any specific candidates for appointment.

56. As in the event of the appointment of a second arbitrator, all potential appointees are requested to conduct a check for conflicts of interest and submit a written statement of impartiality and independence, thereby making any required disclosure.

(c) Appointment of a sole arbitrator

57. A sole arbitrator is to be appointed by the appointing authority where the parties have agreed that the tribunal will be composed of a sole arbitrator but have reached no agreement on the individual who is to serve as sole arbitrator within thirty days. The appointment procedure corresponds to that for a presiding arbitrator of a three-member tribunal. Sole-arbitrator tribunals have been rare in ISDS. Only 1 ISDS case for which the PCA acted as registry was decided by a sole arbitrator. In that case, the sole arbitrator was appointed by the appointing authority.

3. Arbitrator challenges in ISDS cases under the UNCITRAL Arbitration Rules

58. The UNCITRAL Arbitration Rules require an arbitrator to “disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.”¹² A party may challenge an arbitrator “if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.”¹³

(a) Challenges in ISDS registry cases

59. The PCA has broad experience in handling challenges to arbitrators. The PCA’s role typically takes the following forms: (i) the PCA Secretary-General himself decides the challenge;¹⁴ or (ii) the PCA’s International Bureau provides administrative assistance to the appointing authority designated to decide the challenge.¹⁵

60. From 2001 to January 2018, the PCA saw one or more arbitrator challenges in 33 ISDS cases for which it acted as registry. This means that over 80 per cent of the PCA’s ISDS cases proceeded without an arbitrator challenge. In the 33 cases that did involve one or more arbitrator challenges, 60 different arbitrators were challenged in 52 notices of challenge. All notices of challenge were submitted under the UNCITRAL Arbitration Rules 1976 or 2010.

¹² Article 9 of the UNCITRAL Arbitration Rules 1976, Article 11 of the UNCITRAL Arbitration Rules 2010.

¹³ Article 10(1) of the UNCITRAL Arbitration Rules 1976, Article 12(1) of the UNCITRAL Arbitration Rules 2010.

¹⁴ In addition, the PCA Secretary-General has occasionally provided a recommendation as to how a challenge might be decided upon the request of the appointing authority, see S. Grimmer, “The Determination of Arbitrator Challenges by the Secretary General of the Permanent Court of Arbitration”, *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunal* (Brill Nijhoff, 2015), pp. 83–85.

¹⁵ Often, after an appointing authority has been designated by the PCA, the appointing authority seeks the administrative support and assistance of the International Bureau of the PCA. In this regard, one may highlight, for example, the PCA’s experience in supporting the work of the Iran-United States Claims Tribunal, where the PCA has acted as secretariat to the appointing authority in relation to, so far, 22 challenges.

61. These challenges involved the following procedural situations:

<i>Challenging a arbitrator challenging party</i>	<i>No. of challenges excluding concurrent challenges to several members of the tribunal</i>	<i>No. of challenges including concurrent challenges to several members of the tribunal</i>
Presiding arbitrators challenged by either party	2	7
Arbitrators appointed by claimant challenged by claimant	1	1
Arbitrators appointed by claimant challenged by respondent	25	29
Arbitrators appointed by respondent challenged by claimant	18	18
Arbitrators appointed by respondent challenged by respondent	0	4
Sole arbitrator challenged by either party	1	1

62. Seventeen notices of challenge were filed within six months of the commencement of the arbitration or shortly after the appointment of the challenged arbitrator.

(b) The standard of impartiality and independence

63. Under the UNCITRAL Rules, an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.¹⁶ This is an objective test. A challenge is upheld if a reasonable third person having knowledge of the relevant facts would have justifiable doubts as to the arbitrator's impartiality or independence. A showing of actual bias or prejudgment by the arbitrator is not required for a challenge to be sustained.

64. The procedure to be followed to reach a decision on a challenge is at the discretion of the appointing authority. The PCA Secretary-General typically decides challenges on the basis of one or two rounds of written submissions by the parties, although in one case, at the request of the parties, a hearing was held. The challenged arbitrator is also given an opportunity to comment on the challenge.

(c) Outcomes of arbitrator challenges in ISDS registry cases

65. Out of the challenges against 60 different arbitrators in ISDS cases for which the PCA acted as registry, 24 were decided by the PCA Secretary-General and 19 by another appointing authority. No decision was required in respect of the remaining challenges.

66. Specifically, as regards requests submitted to the PCA Secretary-General, challenges were rejected in respect of 18 arbitrators and upheld in respect of 6 arbitrators. In 4 instances the arbitrator resigned before a decision was issued. One request was withdrawn by the challenging party. One challenge is currently pending.

67. As regards requests submitted to another appointing authority, challenges were rejected in respect of 12 arbitrators and upheld in respect of 7 arbitrators. Eight arbitrators resigned before a decision was issued. The challenging party withdrew its request in 2 instances. One arbitrator resigned before the appointing authority was designated.

¹⁶ Article 12(1) of the UNCITRAL Arbitration Rules 2010.

Figure 4
Challenges in PCA ISDS registry cases



68. The average time in which the PCA Secretary-General issues his decision, from the date of the last submission, is fifteen days.¹⁷ The Secretary-General provides reasons for his decision if at least one party so requests.

¹⁷ S. Grimmer, "The Determination of Arbitrator Challenges by the Secretary-General of the Permanent Court of Arbitration", *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunal* (Brill Nijhoff, 2015), p. 89.